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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

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RAYMOND L. BOVINO,

Appellant,

vs.

MIDDLESEX COUNTY BOARD
OF SOCIAL SERVICES,

Appellee.

—o—

JURISDICTIONAL STATEMENT ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY AND THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

—o—

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QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments prohibit a state agency from disciplining a public employee for communicating pro-life information to a pregnant welfare recipient outside the office, on the employee's own time, and at the request of the recipient, without a showing of actual disruption to the operations of the agency.

2. Whether the oral directive "Do not preach to the client" is overbroad, vague and content-based, in violation of the First and Fourteenth Amendments.

3. Whether the First Amendment duty of independent review of the entire record requires the state courts to articulate their independent analysis instead of deferring to an agency's findings and conclusions.

INTERESTED PARTIES

The parties set forth in the caption of this Jurisdictional Statement are the interested parties. The listing requirement of Rule 28.1 is not applicable because appellant is not a corporation.

Amicus curiae briefs were filed below by: The Catholic League for Religious and Civil Rights; Americans United for Life; Free Speech Advocates; American Life League Advocates; and Christian Advocates Serving Evangelism.

TABLE OF CONTENTS

	Page
Questions Presented	i
Interested Parties	ii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Statement of the Case	4
The Questions Presented Are Substantial	9
I. A State Agency Cannot Restrict A Public Employee's Right to Communicate Pro-Life Information Outside the Workplace and On His Time, Without Showing Actual Disruption of Its Operations	9
II. The "No Preaching" Directive Is Overbroad, Vague and Content-Based	13
A. The Directive Is Overbroad	13
B. The Directive Is Void for Vagueness	16
C. Improper Motivation Renders the Directive Invalid	18
III. The State Courts Failed to Satisfy Their Constitutional Duty of Independent Review	20
Conclusion	22
Appendix:	
1. Final Notice of Disciplinary Action (issued February 10, 1986)	1a
2. Initial Decision (issued October 28, 1986)	4a
3. Final Administrative Action (issued December 23, 1986)	20a

TABLE OF CONTENTS—Continued

Page

4. Opinion of Appellate Division (filed December 24, 1987) 22a
5. Order of Supreme Court (filed June 9, 1988) 24a
6. Notice of Appeal (filed August 25, 1988 in Supreme Court of New Jersey) 25a
7. Notice of Appeal (filed August 25, 1988 in Superior Court, Appellate Division) 26a

TABLE OF AUTHORITIES

Page

CASES

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 19

American Postal Workers Union v. United States Postal Serv., 830 F.2d 294 (D.C. Cir. 1987) 11

Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) 11

Bigelow v. Virginia, 421 U.S. 809 (1975) 11

Board of Airport Comm'rs v. Jews for Jesus, Inc., 96 L. Ed. 2d 500 (1987) 13, 15, 17, 18

Board of Educ. v. Pico, 457 U.S. 853 (1982) 18

Boos v. Barry, 99 L. Ed. 2d 333 (1988) 18

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 20

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 14

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 14, 18

Coates v. Cincinnati, 402 U.S. 611 (1971) 17

Connick v. Myers, 461 U.S. 138 (1983) 10, 20

Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) 18

Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983) 12

Everson v. Board of Educ., 330 U.S. 1 (1947) 19

Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979) 10

Gooding v. Wilson, 405 U.S. 518 (1972) 15

Grayned v. Rockford, 408 U.S. 104 (1972) 15, 16, 17

Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934) 3

TABLE OF AUTHORITIES—Continued

Page

Harris v. McRae, 448 U.S. 297 (1980) 5

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 14, 15, 16

Houston v. Hill, 96 L. Ed. 2d 398 (1987) 13

Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948) 3

Kelley v. Johnson, 425 U.S. 238 (1976) 20

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 14

Lakewood v. Plain Dealer Publishing Co., 100 L. Ed. 2d 771 (1988) 17

Mando v. Beame, 398 F. Supp. 569 (S.D.N.Y. 1975) 20

Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988) 11, 19, 20

Morton v. Ruiz, 415 U.S. 199 (1974) 17

Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 443 U.S. 1301 (1979) 3

Parker v. Levy, 417 U.S. 733 (1974) 16

Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983) 3

Pickering v. Board of Educ., 391 U.S. 563 (1968) 9, 10

Planned Parenthood Fed'n v. Bowen, 680 F. Supp. 1465 (D. Colo. 1988) 19, 20

Rankin v. McPherson, 97 L. Ed. 2d 315 (1987) 10, 12

Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) 5

Riley v. National Fed'n of the Blind, 101 L. Ed. 2d 669 (1988) 18

Roe v. Wade, 410 U.S. 113 (1973) 10

TABLE OF AUTHORITIES—Continued

Page

Smith v. Goguen, 415 U.S. 566 (1974) 16

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 11

Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) 11

United States v. O'Brien, 391 U.S. 367 (1968) 19

Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982) 12

Wichert v. Walter, 606 F. Supp. 1516 (D.N.J. 1985) 12

Zamboni v. Stamler, 847 F.2d 73 (3d Cir. 1988) 11

CONSTITUTION

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV, § 1 ..... *passim*

STATUTES

28 U.S.C. § 1257 ..... 2, 3

28 U.S.C. § 2103 3

TEXT

Webster's Ninth New Collegiate Dictionary (1987) 14

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JURISDICTIONAL STATEMENT ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY AND THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Appellant Raymond L. Bovino respectfully submits that the constitutional questions presented by this appeal are substantial and require plenary consideration on the merits.

OPINIONS BELOW

The opinion of the administrative law judge was issued on October 28, 1986 and is unreported; it is reproduced as Appendix 2 (4a to 19a). The decision of the Merit System Board of the New Jersey State Department of Personnel, adopting and affirming the opinion of the administrative law judge, was issued on December 23, 1986 and is unreported; it is reproduced as Appendix 3 (20a to 21a). The opinion of the Superior Court of New Jersey, Appellate Division, was entered on December 24, 1987 and is unreported; it is reproduced as Appendix 4 (22a to 23a). The order of the Supreme Court of New Jersey, denying a petition for certification, was entered on June 9, 1988 and is currently unreported; it is reproduced as Appendix 5 (24a).

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JURISDICTION

The order denying a petition for certification was entered on June 9, 1988. App. 5, at 24a. The Notice of Appeal was filed on August 25, 1988 in the Supreme Court of New Jersey, and a copy of the Notice of Appeal was filed on August 25, 1988 in the Superior Court of New Jersey, Appellate Division (the court possessed of the record). App. 6, at 25a; App. 7, at 26a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). The judgment below is final and was rendered by the highest court in which a decision could be had in New Jersey. Appellant challenged an agency order as being repugnant to the Constitution of the

United States, and the state courts decided in favor of its validity. The agency order which was affirmed by the courts below constitutes a "statute" for the purposes of section 1257(2). *See Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 42 (1983); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934). *Cf. Pacific Tel. & Tel. Co. v. Public Util. Comm'n*, 443 U.S. 1301, 1304 (1979) (per Mr. Justice Rehnquist, as Circuit Justice). If this Court determines otherwise, appellant respectfully requests that the papers on appeal be regarded and acted on as a petition for a writ of certiorari, pursuant to 28 U.S.C. § 2103.

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STATUTES INVOLVED

The state "statute" involved in this appeal was never promulgated or published or even reduced to writing. Instead, it was merely an oral directive—"Do not preach to the client"—uttered in a clash between co-workers holding opposing views on abortion. Nevertheless, the state agency and the courts below gave the oral directive the force and sanction of law, treating it as a unilateral promulgation of a rule with continuing legal effect.

This appeal also involves the First and Fourteenth Amendments to the Constitution of the United States. U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

Late in 1985, a young woman was seduced by a man engaged to another woman. When the man learned that the young woman was pregnant, he expressed concern about his career and began to pressure her to have an abortion. Over the following days, he slapped, assaulted and harassed her, and even threatened to take a clothes hanger and abort the child himself.

Unwilling to confide in her parents, the young woman turned for help to Raymond Bovino, an income maintenance worker employed by the Middlesex County Board of Social Services ("the Board"). As a welfare recipient, the young woman had been meeting with Mr. Bovino for one year. They had developed a friendly relationship because, in addition to his official duties, Mr. Bovino listened to the young woman's problems with her first child and offered her advice. Many other employees of the Board

maintained similar unofficial relationships with welfare recipients, both inside and outside the office.

On December 27, 1985, the young woman visited Mr. Bovino at the Board to discuss her new problem. When he learned that she was pregnant and was unsure whether or not to have an abortion, he suggested that she obtain professional counseling and asked if anyone had explained to her the risks of abortion or the alternatives to abortion. She replied that no one had, so Mr. Bovino began to explain that the child could be carried to term and placed for adoption. Almost immediately, he was interrupted by a co-worker who happened to be the acting supervisor for that day. Motivated by past "religious arguments" with Mr. Bovino,[1] the co-worker instructed him: "Do not preach to the client." Although the young woman indicated her desire to continue her discussion with Mr. Bovino, the co-worker forced him to leave her and told him that "under no circumstances is he to try and change a client's mind." Despite the fact that the Board's income maintenance workers routinely perform the functions of social workers, Mr. Bovino was instructed that he could no longer provide social services with respect to the continuation or termination of a pregnancy, such as information concerning "what the options were."

In the meantime, one of the Board's social workers pressured the young woman to "get it over with" and

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[1]Mr. Bovino is of the opinion, shared by millions throughout the nation (but few at the Board), that abortion is tantamount to murder. His co-worker considered this to be a "religious" position, despite the contrary holding in *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) and *Right to Choose v. Byrne*, 91 N.J. 287, 313-14, 450 A.2d 925, 938-39 (1982).

schedule an abortion.[2] She agreed initially, but then cancelled the appointment. When she left the Board at the end of the day, she encountered Mr. Bovino in the lobby and informed him that the appointment had been cancelled. He asked her not to make another appointment until he could talk to her outside the office. Because they were both busy at the time, the young woman gave Mr. Bovino her telephone number so that he could contact her later.

Unable to contact the young woman by telephone, Mr. Bovino stopped by her home the next day (a Saturday). There was no discussion of abortion during the brief visit. Instead, Mr. Bovino left a package of literature, a cassette tape, and the following letter:

> I want to be fair to you in you realizing both sides to your decision. The enclosed literature will help you understand things better.
>
> There also is a place called the Alpha Pregnancy Center that will help you in any way they can. They will even find you a home to live in. Their number is (609) 921-0494. If you want I would be more than glad to take you there Monday night.
>
> Please call me and let me know what you would like to do. I don't want you to make any decision but your own. But I do want to help you as best I can to do what's right in your heart.

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[2]Mr. Bovino's five-year experience with the Board's "family planning services" had disclosed a distinct bias in favor of abortion; the social worker's treatment of the young woman was not atypical. Mr. Bovino, on the other hand, had always refrained from discussing abortion with welfare recipients. He had begun to discuss alternatives to abortion with the young woman only because of his concern (which she shared) that she not make such a grave decision under pressure and without the benefit of all the facts.

Two days later, the young woman visited Mr. Bovino at the Board after hours, but there was no discussion of abortion. Instead, they went to dinner at the home of Mr. Bovino's parents, where they discussed the possibility of going to the Alpha Pregnancy Center to get both sides of the abortion issue.

On January 2, 1986, the young woman experienced some difficulty with her parents, so she contacted Mr. Bovino and he arranged for her to stay with his girlfriend. After work that day, he took her to the Alpha Pregnancy Center, where a counselor discussed the abortion issue with her.

Over the next few days, the young woman discussed the abortion issue with Mr. Bovino on several occasions, but always outside the Board and on Mr. Bovino's own time. Despite increasing pressure from the man who had seduced her, the young woman decided not to kill her unborn baby. The Alpha Pregnancy Center arranged temporary shelter with a couple in Pennsylvania and Mr. Bovino took the young woman to meet them, again on his own time. During a second trip to Pennsylvania, the young woman changed her mind, so Mr. Bovino took her instead to the Alpha Pregnancy Center. After speaking with the counselor, the young woman decided to return to the man who had seduced her. Her unborn child was aborted several days later.

In the meantime, the Board learned about Mr. Bovino's contacts with the young woman and sought to terminate his employment for disregarding the direct order of his co-worker. After a departmental hearing, the penalty

was reduced to a 20-day suspension (ten days with and ten days without pay).

Mr. Bovino appealed his suspension to the Merit System Board of the New Jersey State Department of Personnel, and a de novo hearing was held before an administrative law judge ("ALJ").[3] In briefs and oral argument, Mr. Bovino challenged the Board's actions as being repugnant to the First and Fourteenth Amendments to the Constitution of the United States. Specifically, he argued that the oral directive of his co-worker was vague, overbroad, content-based, and discriminatory, and that the discipline imposed upon him violated his freedom of speech, association and religion because his discussions with the young woman involved a matter of public concern and did not disrupt the Board's operations.

The ALJ rejected the constitutional arguments, holding that: the discussions with the young woman did not involve any matter of public concern and therefore were not entitled to First Amendment protection; Mr. Bovino's conduct could potentially disrupt the functions of the Board; and the order not to "preach" to the client was neither vague nor overbroad. App. 2, at 14a to 17a. The ALJ also ruled that the "no preaching" directive had been violated *at the Board,* even though both the young woman and Mr. Bovino testified (without contradiction) that they

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[3]The young woman continued to call Mr. Bovino because she felt bad about the abortion and had trouble sleeping at night. Despite the disciplinary proceedings pending against him, Mr. Bovino continued to speak and meet with her, outside the Board and on his own time, in order to help her "find some peace of mind."

had never discussed abortion at the Board after the directive.

Mr. Bovino filed written exceptions, raising the same defenses based on the First and Fourteenth Amendments. However, the Merit System Board adopted and affirmed the findings and conclusions of the ALJ. App. 3 at 20a.

Mr. Bovino again raised his constitutional arguments in briefs and oral argument on appeal to the Superior Court of New Jersey, Appellate Division. Without mentioning the constitutional issues, the court affirmed the agency decision, "substantially for the reasons expressed by [the ALJ]." App. 4, at 23a. Mr. Bovino filed a petition in the Supreme Court of New Jersey, seeking certification of the judgment below and relying on the same constitutional arguments. The Supreme Court of New Jersey declined review. App. 5, at 24a.

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THE QUESTIONS PRESENTED ARE SUBSTANTIAL

POINT I

A STATE AGENCY CANNOT RESTRICT A PUBLIC EMPLOYEE'S RIGHT TO COMMUNICATE PRO-LIFE INFORMATION OUTSIDE THE WORKPLACE AND ON HIS OWN TIME, WITHOUT SHOWING ACTUAL DISRUPTION OF ITS OPERATIONS

A public employee may not be punished for speech touching upon a matter of public concern unless his interest in expressing himself is outweighed by the state's interest in promoting the efficiency of its delivery of public services. *See Pickering v. Board of Educ.*, 391 U.S. 563

(1968); *Connick v. Myers,* 461 U.S. 138 (1983); *Rankin v. McPherson,* 97 L. Ed. 2d 315 (1987); *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410 (1979). These cases afford protection to public or private speech that can be fairly considered as touching upon issues of public concern, as opposed to speech arising out of a personal employment dispute. If the public employee's speech relates to a matter of public interest, the state cannot discipline him without showing that his conduct impairs the operations of the state agency.

The opinion below committed constitutional error in applying this balancing test, skewing the results in favor of the state. Both prongs of its analysis represent a radical departure from settled federal precedent. Therefore, this Court should exercise plenary jurisdiction over this appeal in order to clarify the parameters of First Amendment freedoms in the context of public employment.

The threshold inquiry required by the *Pickering* line of cases is whether the employee's speech concerns an issue of public interest. In this regard, it cannot be denied that abortion is a matter of grave public concern. Abortion has been among the most hotly debated national issues since this Court's controversial ruling in *Roe v. Wade,* 410 U.S. 113 (1973). The opinion below did not contest this fact, but attempted to distinguish discussion of a matter of public concern in the abstract from expression of the same ideas in the context of a particular situation. In other words, Mr. Bovino was free to discuss abortion in general, but could not present specific information to a pregnant woman.

This ill-conceived distinction flies in the face of First Amendment values. The right of free speech is an empty

privilege indeed if it extends only to the theoretical and non-controversial. Not only is there no basis for a constitutional distinction between abstract discussion of ideas and their application to a particular case, but also it is well-settled that abortion-related counseling is protected by the First Amendment.[4] *See Bigelow v. Virginia*, 421 U.S. 809 (1975); *Massachusetts v. Bowen*, 679 F. Supp. 137, 144-45 (D. Mass. 1988). Thus, the opinion below committed clear constitutional error in holding that the communication of pro-life information to a pregnant woman is not entitled to First Amendment protection.

The opinion below also clashes with federal precedents on the nature of the showing that must be made in order to justify a restriction on protected conduct. In the federal courts, a public employer seeking to punish an employee for speaking about an issue of public concern must show *actual harm* to its ability to deliver services; presumed or potential disruption is not sufficient to outweigh the employee's interest in freedom of speech or association. *See, e.g., American Postal Workers Union v. United States Postal Serv.*, 830 F.2d 294, 303-04 & nn. 12-13 (D.C. Cir. 1987); *Zamboni v. Stamler*, 847 F.2d 73, 78-79 (3d Cir. 1988); *Berger v. Battaglia*, 779 F.2d 992, 1000-01 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986). *See also Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969) ("in our system, undifferentiated

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[4]The opinion below relied on *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) to support the holding that information concerning abortion is not entitled to First Amendment protection. However, *Thornburgh* merely held that a state cannot *require* a woman to consider specified information about abortion. It did *not* hold that public employees are prohibited from supplying such information upon request, nor did it hold that the provision of such information falls outside the protection of the First Amendment.

fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). This is particularly so where the speech in question occurred outside the workplace, while the employee was off-duty. *See, e.g., Waters v. Chaffin,* 684 F.2d 833, 837-39 (11th Cir. 1982); *Wichert v. Walter,* 606 F. Supp. 1516, 1524-25 (D.N.J. 1985).

Nevertheless, the opinion below held that a "potentially disruptive effect" was sufficient to justify the punishment imposed upon Mr. Bovino for his extracurricular activities. The record below is devoid of any hint that Mr. Bovino's conduct impaired his own job performance or interfered with the regular operations of the Board.[5] Unable to find any actual disruption, the opinion below conjured up an admittedly hypothetical vision of "persons in dire need subjected to sermons as they seek public assistance." While this concern is understandable, there is no evidence that it actually happened in this case; indeed, the ALJ reluctantly conceded that the young woman had welcomed and solicited Mr. Bovino's advice and assistance.

Given the absence of any concrete actual harm, the balance of competing interests should have been struck in favor of Mr. Bovino. Moreover, the adoption of a potential disruption standard represents a substantial erosion

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[5]Although there was a heated exchange between Mr. Bovino and his co-worker when the "no preaching" directive was issued, there is no evidence that it interfered with the efficient functioning of the Board, or that it had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary. *See Rankin,* 97 L. Ed. 2d at 327-29. Moreover, "the disruption, if any, was primarily the result, not of the [appellant]'s exercise of speech, but of his superiors' attempts to suppress it." *Czurlanis v. Albanese,* 721 F.2d 98, 107 (3d Cir. 1983). There is no evidence of any disharmony *after* the directive was issued.

of First Amendment protection for public employees. Therefore, this Court should exercise its jurisdiction in order to restore the constitutional balance by affirming that only actual disruption will justify restrictions on free expression by public employees.

POINT II

THE "NO PREACHING" DIRECTIVE IS OVERBROAD, VAGUE AND CONTENT-BASED

The punishment of Mr. Bovino for violating the "no preaching" directive is a constitutional travesty that cries out for redress. Fundamentally flawed both in form (unwritten) and motivation (to suppress pro-life information), the terms of the directive likewise cannot survive scrutiny under the First and Fourteenth Amendments for overbreadth and vagueness. Therefore, this Court should give plenary consideration to these substantial constitutional questions.

A. The Directive Is Overbroad

The sole basis for the Board's disciplinary action against Mr. Bovino was his alleged violation of the directive, "Do not preach to the client." This directive is unconstitutional on its face because its terms encompass both protected and unprotected speech. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 96 L. Ed. 2d 500 (1987) (regulation banning all "First Amendment activities" in airport terminal void for overbreadth); *Houston v. Hill*, 96 L. Ed. 2d 398 (1987) (ordinance making it unlawful to "in any way . . . interrupt any policeman in the execution of his duty" void for overbreadth).

The standard for overbreadth is not whether the law is sufficiently clear, but whether the law reaches consti-

tutionally protected conduct as well as unprotected activity. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). The overbreadth doctrine is designed to prevent any chilling effect upon the exercise of First Amendment rights. *See Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967). As stated in *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973),

> the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.

Thus, an overbreadth claim may be asserted by a party whose own conduct is clearly unprotected, despite the fact that a more narrowly drafted law would be valid as applied to that party. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 (1984).

The constitutional infirmity of the "no preaching" directive is manifest; the directive clearly extends to a substantial amount of protected conduct. It contains no limitation upon subject matter; it applies to private matters as well as issues of public concern.[6] It is not restrict-

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[6]While the term "preach" suggests religious expression, it can also mean "to urge acceptance or abandonment of an idea or course of action," or "to advocate earnestly." *Webster's Ninth New Collegiate Dictionary* 924 (1987). Thus, the directive may reasonably be interpreted as extending to any moral, political or social issue. *Cf.* note 1 *supra*. The very ambiguity of the term "preach" exacerbated the overbreadth problem by forcing Mr. Bovino to guess at its meaning, *see Hoffman Estates*, 455 U.S. at 494 n.6; *Keyishian*, 385 U.S. at 604, and also by placing un-

(Continued on following page)

ed to conduct that is disorderly or disruptive. Nor is it limited as to time or location; it reaches not only official conduct within the workplace during office hours, but also *any* contact with a client, consensual or otherwise.[7] It does not distinguish between fact and opinion, nor between truthful and false statements. The all-encompassing nature of the directive is underscored by the supplemental admonition: "under no circumstances" could Mr. Bovino try to change a client's mind. Theoretically, this prohibited him from advocating his favorite sports team and even from arguing with clients who erroneously insisted that they were entitled to certain welfare benefits.

In short, the "no preaching" directive is overbroad on its face and therefore cannot supply a valid basis for the punishment imposed upon Mr. Bovino. Accordingly,

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(Continued from previous page)

restrained interpreting power in the hands of his supervisors, *see Board of Airport Comm'rs*, 96 L. Ed. 2d at 509. Case-by-case adjudication of the meaning of the directive would be intolerable because the chilling effect would continue in the meantime. *See id.* at 508.

[7]The federal courts may not impose a narrowing construction upon state law, *see Gooding v. Wilson*, 405 U.S. 518, 520 (1972), but must consider any limiting construction proffered by the state court or agency, *see Hoffman Estates*, 455 U.S. at 494 n.5. In the present case, the ALJ found that the "no preaching" directive was limited to activities within the office (even though the Board insisted that there was no such limitation). However, even with this narrowing construction, the "no preaching" directive is still overbroad because it reaches workplace conduct which is not materially disruptive or disorderly, *see Grayned v. Rockford*, 408 U.S. 104, 118 (1972), and for the other reasons expressed in the text. Moreover, the proffered limitation makes no sense because Mr. Bovino's post-directive activities took place outside the office (with the exception of his brief encounter with the young woman in the lobby, which can hardly be characterized as "preaching").

this Court should exercise its jurisdiction over this appeal in order to remedy a miscarriage of justice and to clarify the parameters of free expression in public employment.

B. The Directive Is Void For Vagueness

A vagueness challenge to a statute or regulation is rooted in procedural due process. Laws must be clear and precise, so that persons of common intelligence, in light of ordinary experience, receive notice and adequate warning of their reach. Vague laws deny due process because they trap the unwary, encourage arbitrary and discriminatory enforcement, and engender a chilling effect upon all conduct conceivably subject to their control. *See Grayned v. Rockford,* 408 U.S. 104, 108-09 (1972).

A law may be challenged for vagueness on its face or as applied. In a facial attack, the law must be vague in all potential applications. *See Hoffman Estates,* 455 U.S. at 493. An as-applied challenge need not address all applications, but only the particular conduct at issue. *See Parker v. Levy,* 417 U.S. 733, 755-57 (1974). Where the law purports to regulate speech, a greater degree of specificity is required and a more stringent standard of review is applied. *See Hoffman Estates,* 455 U.S. at 499; *Smith v. Goguen,* 415 U.S. 566, 573 (1974).

The "no preaching" directive is impermissibly vague both on its face and as applied to Mr. Bovino. The term "preach" is utterly lacking in definitional certainty, *see* note 6 & accompanying text *supra;* it fails to adequately delineate the range of conduct proscribed by the directive. There is no ascertainable standard for determining whether particular conduct falls within the scope of the directive. *See Smith v. Goguen,* 415 U.S. 566 (1974) (statute pro-

hibiting "contemptuous treatment" of American flag void for vagueness); *Coates v. Cincinnati,* 402 U.S. 611 (1971) (statute forbidding the "annoying" of pedestrians void for vagueness). This lack of clarity led Mr. Bovino to believe that he was entitled to meet with the young woman and communicate pro-life information on his own time, outside the workplace, and at her request. Such extracurricular, consensual contact is simply not addressed in the directive, either expressly or implicitly.

The opinion below conceded the fundamental imprecision of the directive by finding that it "could have been more artfully phrased." Regulations restricting First Amendment activities *must* be "more artfully phrased," lest they delegate basic policy matters to the officials charged with their enforcement for resolution on an ad hoc, subjective basis. Such a lack of certainty invites arbitrary and discriminatory applications incompatible with the concept of due process. *See Grayned v. Rockford,* 408 U.S. at 108-09; *Board of Airport Comm'rs,* 96 L. Ed. 2d at 509; *Lakewood v. Plain Dealer Publishing Co.,* 100 L. Ed. 2d 771 (1988). This danger is exacerbated by the unwritten form of the "no preaching" directive, which leaves its precise terms at the mercy of the supervisor's memory and bias during later disciplinary action. *See Morton v. Ruiz,* 415 U.S. 199, 231-32 (1974) (unpublished ad hoc determinations are inherently arbitrary).

Because the "no preaching" directive is impermissibly vague on its face and as applied, the courts below committed clear constitutional error in sustaining the disciplinary action against Mr. Bovino. Accordingly, this Court should give plenary consideration to this appeal in order to rectify a serious infringement on fundamental rights.

C. Improper Motivation Renders the Directive Invalid

The First Amendment is decidedly hostile to regulations that restrict expression because of its message, ideas, subject matter or content. The state can neither favor some viewpoints at the expense of others, nor exclude certain viewpoints or topics from the marketplace of ideas. *See Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530, 537 (1980); *City Council v. Taxpayers for Vincent,* 466 U.S. at 804; *Board of Airport Comm'rs,* 96 L. Ed. 2d at 506; *Boos v. Barry,* 99 L. Ed. 2d 333, 343-45 (1988); *Riley v. National Fed'n of the Blind,* 101 L. Ed. 2d 669, 685-86 (1988). For example, in *Board of Educ. v. Pico,* 457 U.S. 853 (1982), a local school board ordered the removal of certain books from high school libraries. This Court recognized that the board possessed significant discretion to determine the content of school libraries, but held that such discretion "may not be exercised in a narrowly partisan or political manner." *Id.* at 870.

> Our Constitution does not permit the official suppression of *ideas.* Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in [our prior cases].

Id. at 871 (emphasis in original; footnote omitted).

Given this analysis, there can be no doubt that the "no preaching" directive contravenes First Amendment rights. The Board openly admitted that the directive was intended to squelch Mr. Bovino's "religious beliefs" relating to abortion.[8] The undeniable purpose of the directive was to deny the young woman and other welfare recipients access to ideas (concerning the risks of and alternatives to abortion). Not only was Mr. Bovino forbidden to discuss "what the options were," but also the Board even went to the point of interrupting his initial conversation with the young woman in order to suppress such ideas.[9] As Mr. Bovino testified (without contradiction by the Board), there is a demonstrable pro-abortion bias on the part of the Board. Indeed, even as Mr. Bovino was being told not to discuss abortion with the young woman, one of his co-workers was pressuring the young woman to schedule an abortion immediately.[10]

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[8]Abortion is not a "religious" issue, *see* note 1 *supra*, but even if it were, "[n]o person can be punished for entertaining or professing religious beliefs." *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

[9]Information concerning risks and options is of obvious concern to a woman considering whether or not to have an abortion. *See Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 446 (1983). There was no showing below that the information supplied by Mr. Bovino was inaccurate or unwanted. Therefore, the Board had no legitimate interest in suppressing such information. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). Its knee-jerk overreaction to Mr. Bovino's initial discussion with the young woman represents an impermissible "governmentally imposed block on the flow of neutral information bearing on abortion." *Massachusetts v. Bowen*, 679 F. Supp. at 147. *See also Planned Parenthood Fed'n v. Bowen*, 680 F. Supp. 1465, 1474 (D. Colo. 1988).

[10]Although the Board could conceivably justify a narrowly-drawn regulation designed to protect its clients from unwanted

(Continued on following page)

Thus, it is clear that the "no preaching" directive is an unconstitutional attempt to suppress ideas which conflict with the Board's "officially prescribed orthodoxy." *See Massachusetts v. Bowen,* 679 F. Supp. at 144-45 (regulations specifically designed to suppress one viewpoint on abortion violate First Amendment); *Planned Parenthood Fed'n v. Bowen,* 680 F. Supp. 1465, 1476-78 (D. Colo. 1988) (same). Therefore, the Board's directive is invalid, and Mr. Bovino cannot be penalized for violating it. Accordingly, this Court should exercise its jurisdiction over this appeal in order to reaffirm that it will not tolerate content-based regulation of expression.

POINT III

THE STATE COURTS FAILED TO SATISFY THEIR CONSTITUTIONAL DUTY OF INDEPENDENT REVIEW

This Court has repeatedly held that, in cases raising First Amendment issues, appellate courts have an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. *See Bose Corp. v. Consumers Union,* 466 U.S. 485, 499 (1984); *Connick v. Myers,* 461 U.S. at 150 n.10. Nevertheless, the Supreme Court of New Jersey refused to review

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(Continued from previous page)

intrusion on abortion decisions, any such regulation would have to be even-handed and content-neutral. However, singling out Mr. Bovino and prohibiting only pro-life information while leaving pro-abortion employees free to advocate their views obviously runs afoul of the equal protection and due process clauses as well as the First Amendment. *See Kelley v. Johnson,* 425 U.S. 238, 244 (1976); *Mando v. Beame,* 398 F. Supp. 569, 572 (S.D.N.Y. 1975).

the record, and the Superior Court of New Jersey, Appellate Division applied a limited standard of review applicable only to discretionary decisions of an administrative agency. Neither court even mentioned the First Amendment; the Supreme Court of New Jersey was silent, while the Appellate Division merely adopted the ALJ's opinion "substantially." Such cryptic deference threatens to vitiate the important safeguard embodied in the duty of independent review.

The failure of the state courts to discharge their constitutional obligation is evidenced most dramatically in their rubber-stamping of unsupported factual "findings" by the ALJ. For example, the record is devoid of support for the suggestion that Mr. Bovino discussed abortion with the young woman *at the Board* after the "no preaching" directive. Indeed, the undisputed testimony of both the young woman and Mr. Bovino is directly to the contrary—all post-directive discussions about abortion took place outside the Board, on Mr. Bovino's own time, and at the request of the young woman. Moreover, even a cursory review of the record clearly shows that the Board's entire case against Mr. Bovino was precipitated by and predicated upon his *extracurricular* activities.

The courts below committed constitutional error in neglecting to correct or even to address the ALJ's mistaken findings and conclusions concerning the First Amendment issues. Accordingly, this Court should exercise its jurisdiction and review the entire record in order to vindicate the important constitutional rights at stake on this appeal.

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CONCLUSION

For the foregoing reasons, appellant Raymond L. Bovino respectfully requests that this Court give plenary consideration to the substantial constitutional questions presented by this appeal.

Respectfully submitted,

RICHARD F. COLLIER, JR.

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Attorneys for Appellant
Raymond L. Bovino

Dated: September 6, 1988

FINAL NOTICE OF DISCIPLINARY ACTION

Department of Civil Service • State of New Jersey

INSTRUCTIONS: This notice must be served on a permanent employee or an employee serving a working test period in the classified civil service after a hearing of one of the following types of disciplinary actions is taken: (a) suspension or fine of more than five days at one time; (b) suspension or fines more than three times or for an aggregate of more than fifteen days in one calendar year; (c) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (d) removal; or (e) resignation not in good standing. If the employee does not request or does not appear at the hearing, this notice must be served as the final action. A copy of this notice must be sent to the Department of Civil Service and served on the employee by personal service or certified or registered mail.

FROM: Jurisdiction (Local Service) Middlesex County Board of Social Services; Department, Human Services; Division, Institution or Agency, Public Welfare; State Payroll Number, —; Address, P.O. Box 509, New Brunswick, NJ 08903; Date, February 10, 1986.

TO: Name of Employee, Ray Bovino; Title, Income Maintenance Worker; Social Security Number, 135-38-9106; Street, P.O. Box 115; City and State, Zarephath, NJ 08890.

On January 10, 1986 you were served with a Preliminary Notice of Disciplinary Action (CS-31A) and notified of the pending disciplinary action: (An amended CS-31A was issued on January 23, 1986)

[X] You requested a hearing which was held on January 28, 1986

[ ] You did not request a hearing.

[ ] You requested a hearing and did not appear at the designated time and place.

The following charge(s) was dismissed:

Conduct unbecoming an employee in the public service.

Misuse of official position.

Breach of client confidentiality.

[ ] *If checked, charges are continued on attached page*

The following charge(s) was sustained:

Insubordination and serious breach of discipline. On 12/27/85 you were given a direct order by your Acting Supervisor and warned that failure to follow the order could result in disciplinary action. You ignored the order and interfered in a client's personal life. Your actions caused the client unnecessary emotional pain and contributed to her hospitalization.

[ ] *If checked, charges are continued on the attached page*

The following disciplinary action has been taken against you:

[X] Suspension for 20 days, beginning 1/13/86 and ending 2/10/86. (The period 1/13/86-1/24/86 is with pay. The period 1/27/86-2/7/86 is without pay.)

[ ] Removal, effective (date) ————

[ ] Demotion to position of ———— effective (date) ————

[ ] Resignation not in good standing, effective (date) ————

[ ] Fine $———— (amount) which is equal to ———— (number) days pay

[ ] Other disciplinary action: (explain on attached page)

Signature /s/ Angela Macharovis (Appointing Authority or authorized agent)
Title, Acting Director

Method of Service (Check One)

[ ] Personal Service, Name and Title of Server ——, Date Served ————

[ ] Certified or Registered Mail,

Give date of receipt by employee or agent as shown on return receipt postal card and the receipt number: ————

APPEAL PROCEDURE TO THE EMPLOYEE: You have a right to appeal disciplinary actions: (a) suspension or fines more than five days at one time; (b) suspensions or fines more than three times or for an aggregate of more than fifteen days in one calendar year; (c) disciplinary demotion; (d) removal or (e) resignation not in good standing. Your letter of appeal must be filed with the Civil Service Commission within 20 days of receipt of this form. Appeals must be sent to: Civil Service Commission, 215 E. State Street, CN 312, Trenton, N.J. 08625. Appeals must be sent directly to the Civil Service Commission. Do not give your appeal to your Personnel Office for forwarding to the Civil Service Commission.

NOTICE: Your health insurance coverage may be affected by this action; check with your Personnel Office.

DISTRIBUTION: White (Original for Employee). Green (Employee Copy). Canary (Management). Pink (Management). Goldenrod (Civil Service Records)

(SEAL)

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 2163-86
AGENCY DKT. NO.—

RAY BOVINO,

Appellant,

v.

MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,

Respondent.

Richard F. Collier, Jr., Esq., for appellant (Norris, McLaughlin & Marcus, attorneys)

Bernard H. Shihar, Esq., for respondent (Convery, Convery & Shihar, attorneys)

Richard J. Traynor, Esq., for intervenor, Americans United for Life (Traynor & Hogan, attorneys)

Steven F. McDowell, Esq., member of the Wisconsin bar, admitted *pro hac vice*, for intervenor, Catholic League for Religious and Civil Rights

Record Closed: September 13, 1986

Decided: October 28, 1986

BEFORE *RICHARD J. MURPHY*, ALJ:

STATEMENT OF THE CASE

This case turns on the delicate balance between the constitutional right of a public employee to express and advocate private moral views and the interest of the government in ensuring that services are provided to the public without undue disruption. The appellant, Ray Bovino, appeals from a 20-day suspension on charges of insubordination and serious breach of discipline based on allegations that he counseled a pregnant welfare client against abortion on religious grounds, contrary to the instruction of his supervisor, and did so both in his official capacity and on his own time. The question presented is whether the action of the respondent, Middlesex County Board of Social Services, in suspending appellant for giving abortion counseling after being directed to refrain from such activity, violated his constitutional rights guaranteed by the First Amendment. For the reasons set forth below, this opinion affirms the suspension as it applies to appellant's activity in the workplace in violation of his superior's order, and dismisses the appeal.

PROCEDURAL HISTORY

The Appellant appealed his 20-day suspension[1] on February 27, 1986, and the matter was transmitted to the Office of Administrative Law as a contested case on March 27. A hearing was held in South Amboy on May 23, and counsel were requested to submit briefs on the constitutional issues. On July 22, 1986, an order was entered allowing the Catholic League for Religious and Civil

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[1] Ten days with and ten days without pay.

Rights to participate by filing a brief which was completed on July 11. On July 24, the appellant filed his brief on the constitutional issues. Also on that day, a brief was filed by Americans United for Life, which organization was allowed to participate by order of August 27. Respondent's brief was filed on September 8, 1986, and the record was closed on September 13, after a five-day response period.

FINDINGS OF FACT

The facts are not in dispute.

At the time of his suspension, Ray Bovino was an income maintenance worker at the Middlesex County Board of Social Services and was generally responsible for making final determinations as to the eligibility of clients for various public benefit programs. Under the direct supervision of an income maintenance supervisor, appellant collected and analyzed facts enabling him to consider the various standards and complex factors involved in the eligibility determination. Income maintenance workers are specifically responsible for identifying needs and providing individualized assistance appropriate to a variety of specific problems in a wide range of cases without prior approval of the supervisor. In cases involving complex problems, the worker must explore possible solutions with the individuals concerned and recommend plans to a supervisor for suitable programs of supplementary assistance.

In the course of his duties as an income maintenance worker, the appellant had contact with J.M. (hereinafter client), who had applied for public benefits. In addition

to assisting J.M. with questions of eligibility, the appellant claimed that on numerous occasions over the course of the year before December 1985, she had discussed with him her concerns for her daughter V.

On December 27, 1985, J.M., then pregnant, came to the Middlesex County Board of Social Services to inquire as to an extension of Medicaid eligibility, which she was seeking in order to terminate the pregnancy. She spoke to Bovino, who was initially unaware of her pregnancy, and was advised by him that she was not eligible for Medicaid. Bovino confirmed this with his supervisor, Deborah Chambers. He then explained to J.M. the basis for ineligibility. When the appellant commented that her pregnancy was the only way she would be eligible for Medicaid, J.M. indicated that she was pregnant. At this point, Ms. Chambers asked Bovino to leave the interview booth so she could privately discuss J.M.'s intentions and need for benefits. Ms. Chambers left the booth briefly to determine if Medicaid was available for abortion, and she advised Bovino to complete any other income maintenance business matters while she checked the procedure. When Chambers returned to the booth, she overheard a conversation in which Bovino was advising J.M. that she could have the baby adopted rather than aborting the pregnancy. Chambers interrupted the conversation and advised the client that she was eligible for Medicaid and stated that she would get a social worker to assist. At this time, she also indicated to Mr. Bovino that he was to finish any income maintenance business with the client but that he was not to "preach" to her. Chambers then contacted social worker Joan Israel, who attempted to see the client being interviewed by Bovino. When Chambers returned to the

booth, she found Bovino and Ms. Israel arguing over who was going to see the client. She advised Bovino that his function as an income maintenance worker was completed, and that the social worker would handle the matter from there. He insisted that he had something else to discuss with the client, but left the booth when Chambers restated her position that his job was finished.

Shortly after that, Chambers again spoke to Bovino and advised him that he should not attempt to change a client's mind if the client came in and requested a service. His response was that it was his responsibility to advise her and to continue attempts to convince her that she should not commit "murder". She advised him that his income maintenance function did not extend to advising or explaining to a client the options and possible social services available for continuing or terminating a pregnancy. He further stated that he intended to continue to persuade the client not to have an abortion and that he would ensure that Ms. Chambers would not find out about his efforts. In response, she advised the appellant that the agency regulations stated that he would be disciplined or fired if he violated her instructions.

Subsequent to this discussion, appellant saw the client in the waiting room and asked her if an appointment had been scheduled for an abortion. She replied that one had been scheduled and cancelled. Bovino then requested that she not schedule another appointment until he could talk to her. According to the appellant, the client indicated some hesitation about the abortion and wished to speak with him.

The next day, the appellant, accompanied by a female friend, went to the client's home unannounced, and left with her a cassette tape, some literature, and a letter which stated the following:

> I want to be fair to you in you realizing both sides to your decision. The enclosed literature will help you understand things better.
>
> There also is a place called the Alpha Pregnancy Center that will help you in any way they can. They will even find you a home to live in. Their number is (609) 921-0494. If you want I would be more than glad to take you there Monday night.
>
> Please call me and let me know what you would like to do. I don't want you to make any decision but your own. But I do want to help you as best I can to do what's right in your heart. [Exhibit R-2.]

The next contact between appellant and the client occurred on December 30, 1985, when she came to the agency to discuss the possibility of putting her daughter V. up for adoption. Bovino asked why she did not place the child in the custody of her parents, and further stated that V. was a gift of God that she should be grateful to have. He also asked her why she was having another child, and claimed that it was not her baby; it was God's baby. There was no discussion during this interview concerning the proposed abortion.

Later that day, the appellant took the client to his parents' home for dinner, and discussed the possibility of going to the Alpha Pregnancy Center to get both sides of the abortion issue. Later that night, the appellant accompanied the client to her parents' home, had another dinner, and engaged in general conversation without any mention of the pregnancy or the proposed abortion. On

January 2, 1986, the appellant had further contact with the client and she indicated that there were problems at home and that her parents wanted her out of the house. The appellant responded by contacting a female friend to put her up. He then took her to the Alpha Pregnancy Counseling Center in Pennsylvania, where she was counseled by an individual identified as "Nick", who showed her a picture of a 12-week old fetus and a film, during which the client became upset and asked that it be shut off. Appellant took her to his friend's house, where they talked further about the abortion. She stayed with the friend the next day and the subject of adoption was discussed by the appellant when he returned to the friend's house that evening.

The next contact came shortly thereafter at the appellant's parents' home where the appellant learned that the putative father of the client's unborn child, F.M., had come looking for [her] at the agency. At this point, appellant took the client to the police station to make a complaint against F.M., who had made various threats against her. The police report reflects that F.M. had slapped J.M. and threatened to kill her and to perform the abortion with a coat hanger (P-1). F.M. apparently was aware of Bovino's role and had complained to the respondent agency as to his interference.

After filing a police report, appellant suggested that the client go to Pennsylvania to stay and have her baby in a home that he had arranged for her. J.M. testified, at this point, that she was reluctant to go to Pennsylvania and intended to enlist in the army after she aborted the child. Appellant picked her up after talking to the re-

cruiter and intended to take her to Pennsylvania. She requested that he stop at her parents' house and let her out of the car, but he declined to do so stating, he claims in jest, that she would have to open the door and jump out of the moving car. The two stopped at the home of the abortion counselor "Nick", and at that time the client stated want to go to Pennsylvania with appellant, and she called her boyfriend F.M. to pick her up. At this point, appellant ceased his efforts to counsel the client on her pregnancy and she obtained the abortion.

Appellant further testified that all contacts between him and the client, beyond his discussions at the welfare office and initial visit to her home on December 28, 1985, were initiated by her. The client does not dispute this. After the client's boyfriend complained to the agency, the appellant was charged with a number of offenses, including insubordination, serious breach of discipline, conduct unbecoming, misuse of official position, and breach of client confidentiality. The last three offenses were dismissed at the departmental hearing on January 28, 1986, with the remaining charges of insubordination and serious breach of discipline sustained.

There is no dispute as to the above facts, and I so *FIND.*

ISSUE

Did the action of the respondent agency in suspending the appellant for providing abortion counseling to a welfare client, as discussed above, violate his constitutional rights?

ARGUMENTS OF THE PARTIES

Appellant first argues that there was no violation of the directive in question because it was limited to activities within the workplace and, as Bovino had no discussions with the client after the "no preaching" directive, there was no violation of this directive. Alternatively, appellant argues that the respondent Board's disciplinary action against him violated his First Amendment rights as enunciated by the Supreme Court in the cases of *Pickering v. Board of Education,* 391 *U.S.* 563 (1968), and *Connick v. Myers,* 461 *U.S.* 138 (1983). Under those cases, appellant argues that the subject of abortion is a matter of political, social or other concern to the community, and is not an individual grievance limited to his private interest. In that the respondent agency did not prove any substantial or material disruption to its ability to provide services as a result of appellant's action, he argues that he is protected by *Pickering* and subsequent cases from being disciplined for his actions outside of the office on his own time. Appellant further argues that the "no preaching" directive is facially overbroad and, therefore, unconstitutional, in that it contained no limitations as to time, place, subject matter or other circumstances. The directive was further invalid, appellant contends, because it had an improper religious motivation and was intended to impose pro-abortion beliefs. Appellant further cites the so-called New Jersey conscience law, *N.J.S.A.* 2A:65A-3, which prevents persons from being disciplined for refusing to perform or assist in the performance of abortions or abortion services. Bovino also claims entitlement to back pay, interest and attorneys' fees, pursuant to *N.J.A.C.* 4:1-5.5, 5.6, and case law.

Intervenors also argued that Bovino's suspension violates First Amendment rights because his activities involved commenting on matters of public concern, albeit in a private manner, and did not disrupt the work of the office. The Americans United for Life Legal Defense Fund argued that although Bovino did speak with the client in the waiting room of the welfare board, it was a public place and not part of the workplace. Further, Bovino's actions on the job did not disrupt the functioning of the office. With respect to conversations on his own time away from the workplace, both intervenors argued that these were entitled to constitutional protection because the subject was of public concern, and there was no showing of interference with governmental interests and efficiency in providing public services. Both intervenors stressed that most of appellant's conduct occurred off the job, away from the work place.

Respondent agency argued, under the balancing test set forth in *Pickering* and *Connick*, that the conduct of the appellant went far beyond the lawful dissemination of information or addressing of matters of public concern. Further, it had a potentially disruptive effect on the Board's operation because it constituted pressure upon clients by individual case workers, based upon their political or moral philosophy. Such actions, respondent claimed, also disregard the client's right to confidentiality and further disrupts the public employer's ability to provide necessary public services.

DISCUSSION AND CONCLUSIONS OF LAW

The primary issue here is whether the respondent agency's suspension of the appellant for his activities is

invalid because it violated his First Amendment rights. Under the balancing test enunciated by the Supreme Court and the *Connick, Pickering* cases, among others, I CONCLUDE that the action of the respondent agency in suspending the appellant did not violate his First Amendment rights because his speech did not involve a matter of public concern, and his actions did disrupt the operation of the respondent agency and adversely affected the state's interest in promoting the efficiency of the public services it provides. It is further CONCLUDED that the appellant's actions at the workplace in this instance are alone sufficient to support his suspension.

It is reasonably clear from the *Pickering* case and its progeny that the extent to which public employees can be disciplined for making public or private statements turns on both the nature of the statements and their effect on the efficiency of government operations. The essential interest being protected by the First Amendment is the right of public citizens, whether or not they are public employees, to comment on matters of public concern and thereby participate in what is sometimes called the "dialogue of democracy". Public employees who speak of matters of purely private or personal concern are not entitled to the same level of First Amendment protection. *See, Connick v. Myers* at 148. The matters of public concern entitled to First Amendment protection extend to such issues as the allocation of public school funds as in *Pickering,* or racial discrimination practices in public employment as in *Givhan v. Western Line Consolidated School District,* 439 *U.S.* 410 (1979). The internal affairs of the district attorney's office which touched on personal employment inter-

ests were held not to constitute a matter of public concern by Supreme Court in *Connick.*

In the case at hand, while abortion is undeniably a matter of considerable public concern, the subject of J.M.'s pregnancy is not. As the Supreme Court said in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 *U.S.* —, 90 *L. Ed.* 2nd 779 (1986), "Few decisions are more personal and intimate, more properly private, or basic to individual dignity than a woman's decision . . . whether to end her pregnancy." (90 *L. Ed.* at 801). Her pregnancy and her personal and intensely private right to end or continue it was the sole subject addressed by the appellant. He was not speaking on the issue of abortion as a matter of general concern, but rather was attempting to intervene in this most intimate and private of individual decisions. While it may be argued that there is public concern in any abortion, the protective veil of privacy has, subject to limitations, been draped over the choice of abortion by Supreme Court decisions, as it has in other matters of procreation and family life. Whether or not J.M. determined to end or continue her pregnancy is therefore not the sort of matter of public concern protected by the *Pickering* line of cases, although abortion in the more general sense might well be.

It is also apparent that appellant's activities on the job disrupted both his working relationship with other employees of the Middlesex County Board of Social Services, as well as the critical service function that the agency is expected to provide to members of the public. Persons entitled to public services are also entitled to seek and receive them in a climate that is not clouded by the per-

sonal religious or moral views of public employees, however deeply and fervently they are held. A woman seeking assistance in terminating her pregnancy, or in continuing one for that matter, is entitled to do so without having pamphlets pressed in her hand or proselytizing pushed down her throat. Even if in this particular instance, the welfare client may have, in part, welcomed, or at some points, solicited the appellant's advice and assistance on her private choice to abort or carry, the agency cannot tolerate the chilling specter of having persons in dire need subjected to sermons as they seek public assistance. Accordingly, I CONCLUDE that appellant's actions in the workplace in disregarding his superior's directive and continuing to have contact with a client on the subject of her pregnancy justified respondent agency in suspending him for the 20-day period imposed. Although public employees are free to express their views on public matters, within the guidelines established in *Pickering* and following cases, public employment is not intended as a pulpit from which employees may express and advocate their private moral and religious views.[2] Because of the conclusion that appellant's actions on the job were sufficient to support the suspension, there is no need to reach the issue of whether his contact with the client on his own time, which she apparently initiated, would also justify the suspension. There are obvious concerns here as to the use of confidential information, such as that of this client's pregnancy, by public employees who wish to intervene in and interfere with their clients' lives. In this instance, it is specifically

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[2] This general rule apparently does not apply to the presidency. See e.g. Teddy Roosevelt ("Bully Pulpit") and more recent precedents.

noted that the charges of breach of client confidentiality and misuse of official position were dismissed after the departmental hearing. The sole basis of this case is insubordination and serious breach of discipline resulting from the appellant's alleged violation of his supervisor's direct order to him.

With respect to that order, appellant argues fatal vagueness and overbreath. I disagree and CONCLUDE that, under the circumstances, instructions given to the appellant not to "preach" to the client were sufficiently clear to put him on notice not to further discuss her pregnancy in his official capacity. It is further noted that the order was limited to the appellant's responsibilities within the agency and did not involve instructions as to activities outside of the office. (See attached transcript at page 9.) Given that, I conclude that the direct order given in this instance was not facially overbroad under the cases cited by appellant, nor is it insufficiently clear to support the charge of insubordination. The direction to Bovino not to "preach" is also not void and unenforceable as an effort to impose religious beliefs, because it is limited to a direction to him to cease discussing matters beyond the scope of his proper job function as to the client's decision to abort her pregnancy. The order does not expressly or implicitly espouse or adopt any position with respect to abortion, but seeks merely to allow clients freedom of choice unfettered by sermonizing from public employees. Although the direction not to "preach" could have been more artfully phrased, it did further the essential function of ensuring that government benefits are dispensed without reference to matters that are left by law to private choice and conscience.

In that this opinion concludes that the action of the respondent agency in suspending the appellant should be affirmed, there is no basis for appellant's claim to back pay, interest and attorneys fees and that request is therefore DENIED.

I further CONCLUDE that the New Jersey Conscience Law, *N.J.S.A.* 2A:65A-3, is inapplicable here in that appellant had no function with respect to performing abortion or providing abortion services.

DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is hereby ORDERED that the action of the respondent Middlesex County Board Social Services in suspending appellant for a period of 20 days is hereby AFFIRMED, and the appeal DISMISSED.

This recommended decision may be affirmed, modified or rejected by the MERIT SYSTEM BOARD, which by law is empowered to make a final decision in this matter. However, if the Merit System Board does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

I hereby FILE my Initial Decision with the MERIT SYSTEM BOARD for consideration.

/s/ Richard J. Murphy
Date Oct. 28, 1986 Richard J. Murphy, ALJ

Receipt Acknowledged:
/s/ Peter J. Calderone
Date Oct. 28, 1986 Merit System Board

Mailed to Parties:
/s/ Ronald I. Parker /k.s.
Date Oct. 30, 1986 Office of Administrative Law

ds/e

WITNESSES

Ray Bovino
Deborah Chambers
J.M.
John Auiliano

EXHIBITS

P-1 Investigation Report

R-1 Memorandum to Staff from Carol A. Puleio, dated May 18, 1978

R-2 Note to J.M. from Ray Bovino

R-3 Job Description, Job Tasks, Job Performance Standards—Social Worker, Family Planning

R-4 John Description, Income Maintenance Technician—Case Supervision, revised January 1978, and attachments

R-5 New Jersey Department of Civil Service Class Specification, May 29, 1985

R-6 New Jersey Department of Civil Service Class Specification, January 2, 1985

(SEAL)

STATE OF NEW JERSEY
DEPARTMENT OF PERSONNEL

FINAL ADMINISTRATIVE ACTION
OF THE
MERIT SYSTEM BOARD

In the Matter of Ray Bovino

ISSUED: Dec. 23, 1986

The appeal of Ray Bovino, Income Maintenance Worker, Middlesex County Board of Social Services, suspension for twenty (20) days, beginning January 13, 1986 and ending February 10, 1986 (period of January 13, 1986 to January 24, 1986, is with pay; period of January 27, 1986 to February 7, 1986, is without pay), on charges, was heard by Administrative Law Judge Richard Murphy, who rendered his initial decision on October 28, 1986. Exceptions were filed on behalf of the appellant. No cross exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Merit System Board at its meeting on December 10, 1986, accepted and adopted the Findings and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Merit System Board finds that the action of the appointing authority in its twenty (20) day suspension of appellant was justified. The Board therefore affirms that action and dismisses the appeal of Ray Bovino.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
MERIT SYSTEM BOARD ON
DECEMBER 10, 1986

/s/ Eugene J. McCaffrey, Sr.
Eugene J. McCaffrey, Sr.
Commissioner
Department of Personnel
Inquiries and Correspondence

Peter J. Calderone, Director
Division of Appellate Practices
and Labor Relations
CN 312
Trenton, New Jersey 08625

attachment

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2634-86T8

RAYMOND L. BOVINO,

Appellant,

v.

MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,

Respondent.

(Filed December 24, 1987)

Argued November 12, 1987—Decided Dec. 24, 1987

Before Judges Gaulkin, Gruccio and D'Annunzio

On appeal from the State Department of Personnel, Merit System Board

Richard F. Collier, Jr., argued the cause for appellant (Collier, Jacob & Sweet, attorneys; Mr. Collier and Joseph E. Sales of Norris, McLaughlin & Marcus, on the brief).

Bernard H. Shihar, argued the cause for respondent, Middlesex County Board of Social Services (Convery, Convery & Shihar, attorneys; Mr. Shihar, on the brief).

Lewis A. Scheindlin, Deputy Attorney General, submitted a Statement in Lieu of Brief on behalf of respondent, Merit System Board (W. Cary Edwards, Attorney General, attorney).

Steven F. McDowell, General Counsel, Catholic League for Religious and Civil Rights, filed an *amicus curiae* brief (Steven N. Taieb, on the brief).

PER CURIAM

Appellant, Raymond L. Bovino, was an income maintenance worker employed by the Middlesex County Board of Social Services (Board). The Board suspended Bovino for 20 days for "[i]nsubordination and serious breach of discipline." Bovino appealed. After a hearing, Administrative Law Judge Richard J. Murphy recommended affirmance of the Board's action in suspending Bovino. The Merit System Board adopted the ALJ's findings and conclusions and affirmed the suspension. Bovino appeals.

The findings and conclusions of the ALJ are supported by substantial credible evidence in the record. *Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19 (1981); *Mayflower Securities Co. v. Bureau of Securities*, 64 *N.J.* 85 (1973); *Close v. Kordulak Bros.*, 44 *N.J.* 589 (1965). We affirm substantially for the reasons expressed by Judge Murphy in his comprehensive and lucid decision.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Jack G. Trubenbach
Clerk of the Appellant Division

SUPREME COURT OF NEW JERSEY
C-1114 September Term 1987

28,263

RAYMOND L. BOVINO,

Petitioner,

vs.

MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,

Respondent.

ON PETITION FOR CERTIFICATION

(Filed June 9, 1988)

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-2634-86T8 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice at Trenton, this 7th day of June, 1988.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT
OF NEW JERSEY

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

COLLIER, JACOB AND SWEET
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(201) 560-7100
Attorneys for Appellant

RAYMOND L. BOVINO,	)	SUPREME COURT
	)	OF NEW JERSEY
Petitioner,	)	
	)	C-1114
vs.	)	September
	)	Term 1987
MIDDLESEX COUNTY BOARD	)	28,263
OF SOCIAL SERVICES,	)	
	)	NOTICE OF
Respondent.	)	APPEAL

(Received August 25, 1988)

TO: BERNARD H. SHIHAR, ESQ.
Convery, Convery & Shihar
Attorneys for Respondent
3 Amboy Avenue
P. O. Box 386
Metuchen, New Jersey 08840

SIR:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1257(2), Raymond L. Bovino is appealing to the Supreme Court of the United States from the Order entered in the above-captioned matter on June 9, 1988, by the Supreme Court of New Jersey, denying the Petition for Certification of the judgment entered on December 24, 1987, by the Superior Court of New Jersey, Appellate Division, under docket No. A-2634-86T8.

PLEASE TAKE FURTHER NOTICE that 28 U.S.C. § 2403(b) may be applicable and therefore a copy of this

Notice of Appeal will be served upon the Attorney General of New Jersey, through the Deputy Attorney General who entered an appearance in this action.

COLLIER, JACOB & SWEET
A Professional Corporation
Attorneys for Appellant

By /s/ Richard F. Collier, Jr.
RICHARD F. COLLIER, JR.
A Member of the Firm

Dated: August 25, 1988

CERTIFICATE OF SERVICE

I hereby certify that on this date one copy of the within Notice of Appeal was served upon all counsel of record by first-class mail, postage prepaid, at Somerset, New Jersey, addressed to:

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RICHARD F. COLLIER, JR.

Dated: August 25, 1988

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RAYMOND L. BOVINO,	)	SUPREME COURT
	)	OF NEW JERSEY
Petitioner,	)	C-1114
	)	
vs.	)	September
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	)	NOTICE OF
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Attorneys for Appellant

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RICHARD F. COLLIER, JR.
A Member of the Firm

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/s/ Richard F. Collier, Jr.
RICHARD F. COLLIER, JR.

Dated: August 25, 1988

---

(2)

Supreme Court, U.S.
FILED
OCT 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-413

In The

Supreme Court of the United States

October Term, 1988

RAYMOND L. BOVINO,

Appellant,

v.

MIDDLESEX COUNTY BOARD
OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF NEW JERSEY

MOTION TO DISMISS

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October 4, 1988

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22pp

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under 28 U.S.C. §1257(2), because the directives issued by Appellant's supervisor were not state statutes.

2. Whether a public entity may properly limit an employee's expression of his personal views in the workplace, so as not to be a violation of his First Amendment constitutional rights.

3. Whether the oral directives issued by Appellant's supervisor were sufficiently clear and explicit, so as not to violate an employee's First Amendment rights on grounds of overbreadth, vagueness, or improper motivation.

4. Whether the state court properly reviewed the record below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

MOTION TO DISMISS 1

VERBATIM CITATIONS TO OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 7

I. THE COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(2) BECAUSE THE DIRECTIVES ISSUED BY APPELLANT'S SUPERVISOR WERE NOT STATE STATUTES 7

II. A PUBLIC ENTITY MAY PROPERLY LIMIT AN EMPLOYEE'S EXPRESSION OF PERSONAL VIEWS IN THE WORKPLACE, SO AS NOT TO VIOLATE THE EMPLOYEE'S FIRST AMENDMENT RIGHTS 9

III. THE ORAL DIRECTIVES ISSUED BY APPELLANT'S SUPERVISOR WERE SUFFICIENTLY CLEAR, SO AS NOT TO VIOLATE AN EMPLOYEE'S FIRST AMENDMENT RIGHTS ON GROUNDS OF OVERBREADTH, VAGUENESS, OR IMPROPER MOTIVATION 12

TABLE OF CONTENTS–Continued

Page

IV. THE STATE COURT PROPERLY REVIEWED THE RECORD BELOW 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Airport Comm'rs v. Jews for Jesus, Inc. 482 U.S. ___, 96 L. Ed 2d 500 (1987) 12

Arnett v. Kennedy, 416 U.S. 134 (1974), reh. den 417 U.S. 977 9

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 14

Connick v. Myers, 461 U.S. 138 (1983)..... 9, 11, 14

CSC v. National Association of Letter Carriers, 413 U.S. 548 (1973) 13

Czurlanis v. Albanese, 721 F. 2d 98 (3d Cir 1983)..... 10

Gooding v. Wilson, 405 U.S. 518 (1972)..... 12

Hamilton v. Regents of University of California, 293 U.S. 245 (1934) 8

Johnson v. Lincoln Univ. of Com., 776 F. 2d 443 (3d Cir. 1985) 10

Lewis v. New Orleans, 415 U.S. 130 (1974)..... 12

Overbreadth-First Amendment, 45 L. Ed 2d 725, §1(a) 12

Pickering v. Board of Education, 391 U.S. 563 (1968) . 9, 11

Pietrunti v. Brick Tp. Bd. of Ed., 128 N.J. Super. 149 (App. Div. 1974), *certif. den.* 65 N.J. 573 (1974), *certif. den.* 419 U.S. 1057 (1974) 10

Williams v. Bruffy, 96 U.S. 176 (1877) 8

TABLE OF AUTHORITIES–Continued

Page

STATUTES

28 U.S.C. §1257(2) 1, 7, 8, 9, 14

TEXTS

Black's Law Dictionary, 1264 (5th Ed. 1979) 8

Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th Ed. 1986) 8

MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the Order and Decision of the Court below on the grounds of lack of jurisdiction and/or that the questions presented are so unsubstantial as not to need further argument.

If the Court regards this appeal as a writ of certiorari, Appellee requests the writ of certiorari be denied because the cases set forth in this motion are controlling and the questions presented herein are unsubstantial.

VERBATIM CITATIONS TO OPINIONS BELOW

The text of the Opinions, Orders and Judgments below are unreported and are contained in the Appendices attached to the Jurisdictional Statement filed by Appellant, at pp. 1a through 24a.

STATEMENT OF JURISDICTION

The cases cited by the Appellant for the proposition that the directives issued herein were "state statutes" under 28 U.S.C. §1257(2) are inapposite, leaving the Court without jurisdiction to hear this matter as a direct appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellee concurs with Appellant that this appeal involves the First Amendment of the United States

Constitution. Appellee argues herein that no "state statute" was involved.

STATEMENT OF THE CASE AND FACTS

On December 27, 1985, J.M. ("client") came to the offices of the Middlesex County Board of Social Services ("the Board"), seeking an extension of her Medicaid benefits. She was seen by Raymond L. Bovino ("Bovino"), an income maintenance worker employed by the Board.[1] He stated that the client was not eligible for extended benefits at this time. Bovino wanted to speak with Deborah Chambers ("Chambers"), his acting supervisor, to see if there were any possible way to extend benefits.

In the meeting amongst J.M., Bovino and Chambers, Chambers explained that J.M. was not eligible for further assistance. When Bovino commented that the only way J.M. would be eligible for Medicaid was if she were pregnant, the client revealed she was pregnant.

Chambers asked Bovino to leave the interview booth so she could privately discuss J.M.'s intentions regarding the pregnancy. Once he left, she asked if J.M. wished to continue the pregnancy or terminate the pregnancy. J.M. informed Chambers that she wanted to terminate the pregnancy. Chambers left the booth briefly to discuss with the intake supervisor the procedure for obtaining

---

[1] Bovino had previously seen J.M. regarding welfare benefits when J.M. sought continuaton of a prior pregnancy and medical care for that child.

Medicaid. Chambers told Bovino to complete any income maintenance business while she checked the procedure.

When Chambers returned, she heard Bovino advising J.M. that she could have the baby and give it up for adoption rather than having an abortion. Chambers interrupted the conversation, told J.M. that she was eligible for Medicaid and told J.M. that a Board social worker would assist her to make the appropriate arrangements. Chambers told Bovino that he was to finish any income maintenance business and that he was not to preach to the client. Chambers then left to find a Board social worker.

Despite Chamber's direct instructions, Bovino continued to advise the client that abortion was wrong even though that was what she wanted. Bovino went on to say that it was not J.M.'s baby and J.M. had no right to decide if she wanted an abortion or not.

Chambers had contacted Joan Israel ("Israel"), a Board social worker, who was also the family planning specialist, to see J.M.[2] After explaining the client's circumstances, Chambers went to find out J.M.'s actual termination date of benefits, while Israel went to see the client.

When Chambers returned to the booth, she found Bovino and Israel arguing over who was to see the client.

---

[2] It should be noted that Bovino's job function was to determine eligibility for various public assistance programs. He was not employed as a social worker, whose job description specifies the type of family planning J.M. requested.

Bovino told Israel that he was not finished with the interview. Chambers advised Bovino that his job as an income maintenance worker was completed because the problem should now be handled by the social worker. Bovino insisted he had something else to discuss with the client, but left the booth when Chambers restated her position.

J.M. told Israel that she wanted the abortion. Israel told J.M. that if that was what she wanted, then that is what she should do: it was J.M.'s decision to make.

Upon returning to their office, Chambers again spoke to Bovino and told him that it was not his responsibility to attempt to change a client's mind. Bovino replied that it was his responsibility to advise a client and that he would continue to try and convince a client that she should not commit murder. Chambers advised Bovino that his responsibilities did not extend to advising or explaining to a client what options or social services existed for either continuing or terminating a pregnancy. Bovino then stated that he would continue to "try and prevent the client from committing murder" and he would "make sure that Chambers would not find out about it." In response, Chambers told Bovino that agency regulations stated that he could either be put on corrective action or that he could be fired if he violated her instructions.[3]

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[3] It should be noted that Bovino received a copy of a memo dated May 18, 1978, issued by the Board regarding confidentiality and conflict of interest between a Board employee and a client.

Shortly after the above discussion, Bovino approached the client in the Board's waiting room. He asked J.M. if an appointment had been scheduled for the abortion. J.M. said it had, but it was cancelled because she wanted the father, F.M., to go with her. J.M. told Bovino she had to call Joan Israel to set up another appointment. Bovino advised J.M. not to call Israel until he could talk to her. Allegedly, J.M. indicated a desire to receive further information.

The next day (December 28, 1985), Bovino and a friend, Ursula Spencer, went to J.M.'s house unannounced. J.M. was surprised to see Bovino and did not really expect him to show up. Bovino gave J.M. an envelope containing a cassette tape, some literature and a letter. Bovino told Spencer that J.M. was pregnant and was thinking of having an abortion, that her parents did not know of the pregnancy and that he was going to show her "the right way" by putting the baby up for adoption.

On December 30, 1985, J.M. came to the Board's offices to discuss the possibility of placing the child from her first pregnancy up for adoption. Bovino advised her that she should keep the child and "thank God you have the child." He stated "that if you don't want a kid, then you should not go to bed with anyone, but now that you're having it, you should go through with the pregnancy." He also told J.M. that it was not her right to decide whether she wanted an abortion or not, that it was God's baby, and not J.M.'s decision.

Bovino then offered J.M. a ride home. She agreed because it was too late to take the bus. Bovino stopped at his parent's house first where J.M. had dinner. Bovino

talked about going to the Alpha Pregnancy Center where counselors were going to show J.M. what was right. J.M. did not wish to go there at that time, and asked Bovino to bring her home.

On January 2, 1986, Bovino had further contact with J.M. when she told him that her parents wanted her out of the house. Bovino took time off from work to take J.M. to the Alpha Pregnancy Center, where she received counseling and an offer to stay in Pennsylvania during her pregnancy. Bovino then dropped J.M. off to meet F.M., the reputed father.

On January 6, 1986, J.M. called Bovino because she wanted to leave home. Bovino arranged for J.M. to stay with his friend Ursula Spencer. On the second night at Spencer's home, J.M. told Bovino that she had an appointment with Joan Israel the next day at the Board offices. Bovino advised her not to see Joan Israel because she would just set up another appointment to have the abortion. In the morning, he again told J.M. it was not a good idea to see Israel and left for the Board office without her.

J.M. spent the next day at the home of Bovino's parents. Bovino learned that the reputed father had come looking for him at the Board offices, attempting to locate J.M. Bovino took J.M. to the New Brunswick and Old Bridge Police Departments to file complaints against F.M. J.M. attempted to contact F.M. Bovino hurried to bring J.M. to Pennsylvania and get her away from her home and F.M. Bovino had arranged for J.M. to stay in Pennsylvania and give birth to the child. J.M. wanted to stop at her home, but Bovino refused. J.M. told Bovino that F.M.

was coming to her house and she wanted to see him, that she did not want to go to Pennsylvania, and that she did not want to have the child. She requested Bovino to bring her home, but he replied that J.M. would have to open the door and jump out of the moving car. J.M. repeatedly asked to be brought back home, but Bovino did not stop until he reached the Alpha Pregnancy Center. Again, Bovino refused to bring her home. She rejected the plans made for her by Bovino and called F.M. who picked her up and brought her home. At this point, Bovino ceased contact with J.M. J.M. ultimately aborted the child and suffered unnecessary emotional pain and hospitalization as a result.

The extent to which Bovino had gone to block the planned abortion was brought to the attention of the Board by the client and her boyfriend, F.M. Disciplinary charges were brought against Bovino. Following a disciplinary hearing, Bovino was suspended for 20 days: 10 days with pay and 10 days without pay. (Appellant's App. 1a-2a). The appeals from that disciplinary action bring the matter before the Court today.

ARGUMENT

I. THE COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(2) BECAUSE THE DIRECTIVES ISSUED BY APPELLANT'S SUPERVISOR WERE NOT STATE STATUTES

28 U.S.C. §1257(2) provides for direct appeal to the United States Supreme Court when "the question of the validity of a *statute* of any state" is challenged under the

Constitution of the United States, and the highest state court reviewing the statute upholds it.

Appellant contends that the directives of Bovino's supervisor were "state statutes" within the meaning of 28 U.S.C. §1257(2).

A statute is defined as "an act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government." *Black's Law Dictionary*, 1264 (5th Ed. 1979)

The reference in §1257(2) to a "statute of any state" has been defined many times to include every action to which a state gives the force of law. *Williams v. Bruffy*, 96 U.S. 176, 183 (1877). The meaning of "statute of any state" is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making power. *Hamilton v. Regents of University of California*, 293 U.S. 245 (1934). The definition also encompasses state constitutional provisions, statewide initiative propositions, municipal ordinances and by-laws, and orders of state commissioners and governing bodies issued in the exercise of their delegated legislative authority. Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th Ed. 1986) at 110.

There was no law, statute or regulation that Appellant can refer to: merely the directives of his supervisor to perform his job within its guidelines and not to influence a client's choice. That action does not rise to the level of "state statute" within the meaning of §1257(2).

Therefore, the Appellee moves the Court to dismiss this appeal for lack of jurisdiction under 28 U.S.C. §1257(2).

II. A PUBLIC ENTITY MAY PROPERLY LIMIT AN EMPLOYEE'S EXPRESSION OF PERSONAL VIEWS IN THE WORKPLACE, SO AS NOT TO VIOLATE THE EMPLOYEE'S FIRST AMENDMENT RIGHTS

The Supreme Court has recognized the right of public employers to regulate the speech of their employees under appropriate circumstances. *Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Board of Education,* 391 U.S. 563 (1968).

These cases have held that the employee's First Amendment rights must be weighed against the disruptive effect of the activities on the Government's ability to provide services. As the Court stated in *Connick,* the balancing of interest to determine whether dismissal of a public employee for statements made by the employee requires " . . . full consideration of the Government's interest in the effective and efficient fulfillment of its responsibilities to the public . . . " *Connick v. Myers, supra,* 461 U.S. at 150. The government as employer must have wide direction and control over the management of its personnel and internal affairs. *Arnett v. Kennedy,* 416 U.S. 134 (1974), reh. den. 417 U.S. 977.

An employee cannot indiscriminately invoke his First Amendment freedom as a bar to disciplinary action when his utterance becomes disruptive of his own work and injurious to the efficiency of his employment unit. *Arnett v. Kennedy, supra. Pickering v. Board of Ed., supra.* The

Constitutional right of a public employee may not override the basic obligation of an employee to an employer. The employer-employee relationship restrains the right of the employee to the extent reasonably necessary to retain that harmony and loyalty which is necessary to the efficient and successful operation of government. *Pietrunti v. Brick Tp. Bd. of Ed.*, 128 N.J. Super. 149, 166 (App. Div. 1974), *certif. den.* 65 N.J. 573 (1974), *certif. den.* 419 U.S. 1057 (1974).

The facts of the case at bar remove it from the domain of that which the First Amendment seeks to protect. The conduct of Appellant goes far beyond the lawful dissemination of information or the addressing of matters of public concern. Cf. *Johnson v. Lincoln Univ. of Com.*, 776 F. 2d 443 (3d Cir. 1985); *Czurlanis v. Albanese*, 721 F. 2d 98 (3d Cir. 1983).

The Board of Social Services is charged with the orderly and efficient administration of various public assistance programs, which include providing the types of services sought by J.M. It is not difficult to perceive the disastrous effect upon Board operations which would result from the unrestrained coercion or pressuring of clients by their individual caseworkers based upon each particular employee's political or moral philosophy. Specifically, the Board offers services for either continuing or terminating a pregnancy. The case of J.M. points this out dramatically: J.M. was given appropriate services for the continuation and medical care for her first pregnancy and was given appropriate services when she requested help for termination of her second pregnancy.

The Appellant argues that the sole basis for the disciplinary action taken against Bovino was his alleged violation of the "no preaching" order issued to him by Chambers on December 27, 1985. That is not the case at bar.

The totality of Bovino's actions[4] served to disrupt the operation of the Board. While Appellant's motivation is not questioned, it is his methods that cannot logically be tolerated if the Board is to function. The key to the issue at hand is the disruption of the public employer's ability to provide services. The client came to the Board seeking assistance and was put through an ordeal by Appellant with total disregard for the client's rights to confidentiality and the provision of those services. All this was clearly a "disruption" as contemplated in *Pickering* and *Connick* which is not, and should not be, shielded by the First Amendment.

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[4] Bovino's disruptive actions, once Chambers issued her original directive, included: (1) continuing discussions within J.M. in the Board office advocating adoption, (2) arguing with Israel over who was to see the client, requiring Chambers to intercede, (3) telling Chambers that he would continue to advise the client and Chambers having to inform him of possible disciplinary action, (4) advising J.M. in the Board's waiting room not to call Israel, (5) using information obtained at the Board office to contact J.M. at home, (6) advising J.M. in the Board office on December 30, 1985 not to have the abortion, (7) advising J.M. not to keep her appointment with Israel, (8) taking days off from work to meet with J.M. and taking her to the Alpha Pregnancy Center, and (9) refusing to reveal to the Board where J.M. was when it received a complaint from F.M.

Since the cases cited above are controlling, and leave no room for controversy, the question presented is unsubstantial and should be cause to grant Appellee's motion.

III. THE ORAL DIRECTIVES ISSUED BY APPELLANT'S SUPERVISOR WERE SUFFICIENTLY CLEAR, SO AS NOT TO VIOLATE AN EMPLOYEE'S FIRST AMENDMENT RIGHTS ON GROUNDS OF OVERBREADTH, VAGUENESS, OR IMPROPER MOTIVATION

For the Court to find that a person's First Amendment rights have been infringed upon on grounds of overbreadth or vagueness, whether upon its face or applied, the Court must invalidate some legislation. Legislation would include federal and state statutes and ordinances, as well as executive and administrative regulations. See *Overbreadth-First Amendment*, 45 L. Ed 2d 725, 728, Section 1(a); Cf. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. New Orleans*, 415 U.S. 130 (1974); See also Point I of Appellee's brief at pp. 7-8.

Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a *statute* on its face, but only if the overbreadth is substantial. *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. ___, 96 L. Ed 2d 500, 507 (1987). (emph. ours).

The directives given to the Appellant were sufficiently clear to put him on notice that he should not impose his personal convictions upon a client.

Furthermore, the cases cited in Appellant's brief are inapposite. Each of those cases refers to an ordinance, regulation or statute. In the case at bar, Appellant's

supervisor was simply telling Bovino, in common language, to do his job within its guidelines and not to attempt to influence a client's choice. See also Point I of Appellee's Brief at pp. 7-8.

The directives were sufficiently clear, not vague, for any ordinary person to understand. Cf. *CSC v. National Association of Letter Carriers*, 413 U.S. 548 (1973).

Appellant further argues that the motivation of the Board was improper. There is nothing within the record below to suggest that the Board has a "pro-abortion bias" other than Mr. Bovino's highly subjective opinion. (Appellant's Brief at 19) In fact, Chambers testified that J.M. was a Board client who received appropriate services for the continuation of her first pregnancy and care of her child when such help was requested and was offered appropriate services when she requested help for termination of her second pregnancy. The Board offers the necessary financial and social services to a client totally dependent on that client's choice.

For the reasons set forth above, the directives were neither overbroad, vague nor improper, and as such, did not violate Appellant's constitutional rights.

IV. THE STATE COURTS SATISFIED THEIR CONSTITUTIONAL DUTY OF INDEPENDENT REVIEW

A full and complete brief along with copies of transcripts of the hearings was submitted by Appellant to the Appellate Division of the Superior Court of New Jersey. Appellee submitted its brief. The Appellate Division held that "the findings and conclusions of the ALJ are supported by substantial credible evidence in this record. . . .

We affirm substantially for the reasons expressed by Judge Murphy in his comprehensive and lucid decision." (Appellant's App. 23a).

Judge Murphy's decision is replete with his discussion of constitutional law, as well as his framing of the constitutional issue in the case (Appellant's App. 11a; 13a-17a).

The petition for certification to the New Jersey Supreme Court set forth Appellant's constitutional arguments, as well as the decisions below. The Board submitted its Appellate Division brief to the New Jersey Supreme Court. The New Jersey Supreme Court denied Appellant's petition for certification (Appellant's App. 24a).

The appellate courts satisfied their duty to make an independent review of the constitutional issues in this case. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Connick v. Myers, supra*, 461 U.S. at 150 (n. 10).

Thus, there was no constitutional error by the courts below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the within appeal should be dismissed or, in the alternative, that the Order, Judgment and Decision below be affirmed, due to the lack of jurisdiction under 28 U.S.C. §1257(2) or that the questions presented have been adjudicated and present no substantial controversy.

If this Court determines that this appeal be regarded as a petition for a writ of certiorari, it is respectfully submitted that the cases set forth above are controlling, and the questions presented to the Court are so unsubstantial as to cause the Court to deny certiorari in this case.

Respectfully submitted,

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Supreme Court, U.S.
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No. 88-413

In The

Supreme Court of the United States

October Term, 1988

RAYMOND L. BOVINO,

Appellant,

vs.

MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY AND THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF OPPOSING MOTION TO DISMISS

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Argument	1
Conclusion	6

TABLE OF AUTHORITIES

	Page
STATUTES	
28 U.S.C. § 1257	5

ARGUMENT

The legal issues posed by the Motion to Dismiss are fully addressed in appellant's Jurisdictional Statement. This Brief will focus on the facts, because the Motion to Dismiss is replete with falsehoods and misrepresentations, which only serve to underscore the crying need for a plenary review of the record in order to redress an injustice of constitutional proportions.

On page 3 of the Motion to Dismiss, appellee purports to describe what happened during the initial contact between Mr. Bovino and the young woman, which took place at the Board on December 27, 1985:

> Despite Chamber's direct instructions, Bovino continued to advise the client that abortion was wrong even though that was what she wanted. Bovino went on to say that it was not J.M.'s baby and J.M. had no right to decide if she wanted an abortion or not.

The record not only is devoid of any support for this scenario, but also directly contradicts it. There is no evidence whatsoever that Mr. Bovino continued to discuss abortion with the young woman after the "no preaching" directive. Three different witnesses (Mrs. Chambers, Mr. Bovino and the young woman) related what happened at the time of the "no preaching" order, and all three agreed on what happened. The administrative law judge ("ALJ") observed that "[t]he facts are not in dispute" (App. 2, at 6a); his findings with respect to the incident in question appear in Appendix 2, at 7a to 8a. Both the testimony and the findings make it clear that there was no discussion of abortion after the "no preaching" directive.

Thus, if the scenario described by appellee took place at all, it took place *before* the "no preaching" directive -- a critical distinction, in this case. Moreover, there is substantial doubt that Mr. Bovino made the remarks attributed to him, even before the directive. Although the young woman mentioned these remarks during her direct examination, on cross-examination she admitted that her earlier testimony was wrong:

> Q: Did [Mr. Bovino] tell you anything at the agency other than about the risks and options that you had?
>
> A. No.

Her testimony on cross-examination is consistent with the testimony of Mrs. Chambers and Mr. Bovino, and also with the findings of the ALJ.

In short, appellee's description of the incident is a complete distortion of the record concerning the nature and timing of Mr. Bovino's initial discussion with the young woman about abortion.[1]

The Board also misrepresents the brief contact between Mr. Bovino and the young woman on December 28, 1985. On page 5 of its Motion to Dismiss, the Board describes this meeting and asserts:

> Bovino told Spencer that [the young woman] was pregnant and was thinking of having an abortion, that her parents did not know of the pregnancy and that he was going to show her "the right way" by putting the baby up for adoption.

However, the Board's assertion is directly contradicted by the testimony of the three witnesses (Mr. Bovino, Miss Spencer and the young woman) who were present at the December 28 meeting. On cross-examination, the young woman admitted:

> Q. When [Mr. Bovino] showed up at your house with [Miss Spencer] the next day for a few minutes, did he tell you anything at all about abortion?
>
> A. ... No, I don't think he did, no.

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[1] It is also misleading for appellee to assert that abortion "was what she wanted." According to Mr. Bovino, the young woman told him during their initial encounter: "I don't know what I want to do." On cross-examination, the young woman admitted that she also told him: "[I]f I have this child, I know that I'll love it and would want to keep it myself." Upon questioning by the ALJ, she stated: "I was with [Mr. Bovino] because I wanted to have the kid." This is certainly not what one would expect from someone who supposedly wanted to abort her child. If the

Q. So he did not during that first occasion, correct?

A. That's correct, yes.

Similarly, the Board's description of the December 30 encounter at the Board's offices is in direct conflict with the testimony of Mr. Bovino and the young woman. According to the Board (on page 5 of its Motion to Dismiss), Mr. Bovino

> stated "that if you don't want a kid, then you should not go to bed with anyone, but now that you're having it, you should go through with the pregnancy." He also told [the young woman] that it was not her right to decide whether she wanted an abortion or not, that it was God's baby, and not [her] decision.

If such remarks were made, they were *not* made at the Board's offices, as the young woman admitted on cross-examination:

Q: On that afternoon, you were at the agency for only a few minutes, correct?

A. Yes.

Q. And during those few minutes, you did not discuss abortion, correct?

A. Yes.

Q. As a matter of fact, other than that first occasion on December 27, there were no other conversations at the agency with [Mr. Bovino] about abortion, were there?

A. No.

The ALJ found as a matter of fact: "There was no discussion during this [December 30] interview concerning the proposed abortion." App. 2, at 9a.

Board had bothered to listen to the young woman instead of immediately pressuring her to have an abortion, the tragic circumstances of this case could have been avoided.

Thus, the Board has deliberately misrepresented the facts to this Court. Contrary to the Board's false assertions, the record plainly shows that Mr. Bovino never discussed abortion with the young woman *in the workplace* after he was told not to do so. All post-directive discussions took place outside the office, on Mr. Bovino's own time,[2] and at the request of the young woman. Accordingly, the actual record -- as opposed to the Board's fanciful version of events -- starkly presents substantial constitutional issues that require plenary consideration on the merits.

The Board's disregard of the record carries over into its legal arguments. On page 11 of the Motion to Dismiss, the Board argues that its disciplinary action was *not* based solely on the alleged violation of the "no preaching" directive. This argument is directly contradicted by Appendix 1, at 2a, and by Appendix 2, at 5a. Indeed, the ALJ stated: "The sole basis of this case is insubordination and serious breach of discipline resulting from the appellant's alleged violation of his supervisor's direct order to him." App. 2, at 17a.

Similarly, the Board suggests (on page 11 and in footnotes 3 and 4 of its Motion to Dismiss) that Mr. Bovino breached client confidentiality and otherwise misused his official position. Based on the Board's own official notice of its disciplinary action, App. 1, at 2a, the ALJ "specifically noted that the charges of breach of client confidentiality and misuse of official position were dismissed after the departmental hearing." App. 2, at 16a to 17a. The Board never appealed the dismissal of these charges, so it cannot rely on them now to justify its conduct in this case. Moreover, it is undisputed that the young woman initiated the post-directive discussions with Mr. Bovino, so the Board's charges are completely without merit.

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[2] Contrary to the suggestion in footnote 4 of the Motion to Dismiss, there was nothing wrongful about Mr. Bovino's taking time off from work. He was entitled to take personal days, and was never charged with being absent without leave. *See* App. 1, at 2a. There was no showing that his time off caused any actual disruption of the agency's operations. The Board's current grasping at such straws is a measure of its desperation on the issue of disruption.

The Board's current reliance on the "totality of Bovino's actions" (page 11 of the Motion to Dismiss) to establish disruption is another crucial departure from its position below, where it argued only that Mr. Bovino's conduct "had a *potentially* disruptive effect." App. 2, at 13a (emphasis added). Moreover, the opinions below were limited to the theory of potential disruption; they did not in any way address or adopt the "totality" concept currently being raised by the Board. In addition, the particular actions considered offensive by the Board (footnote 4 of the Motion to Dismiss) either are facially non-disruptive or fall within footnote 5 of the Jurisdictional Statement.

The arguments set forth on pages 12-13 of the Motion to Dismiss relate primarily to the issue of vagueness; they do not address the merits of the more glaring problem of overbreadth. Whether or not the directive was "sufficiently clear," *see* Point II of the Jurisdictional Statement, it plainly reached protected conduct as well as unprotected conduct.[3] Unable to deny this fact, the Board instead tries to limit the overbreadth doctrine to "statutes" or "legislation." Any such limitation would give free rein to the "chilling effect" in precisely the area where constitutional protection is most likely to be needed -- the day-to-day oral commands which can be used to abuse subordinates and suppress their speech. The very purpose of the overbreadth doctrine is to check such unrestrained discretion to restrict the scope of free expression.

The Board also seems to assert that the "no preaching" directive merely ordered Mr. Bovino to "perform his job within its guidelines." Motion to Dismiss, at 8, 13. However, the Board's own witnesses admitted that the "guidelines" were routinely ignored, so their novel application to Mr. Bovino is inherently suspect. Moreover, the Board does not bother to supply this Court with the "guidelines" which were supposedly violated, so it is impossible to determine on this Motion whether the "guidelines" were narrowly drawn and reasonably applied. Furthermore, the Board's reliance on "guidelines" directly contradicts its position that this

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[3] The Board's own re-phrasing of the directive -- as an order "not to attempt to influence a client's choice" -- is overbroad for the reasons set forth on pages 14-15 of the Jurisdictional Statement.

case does not involve the type of agency regulation encompassed by the term "statute" in 28 U.S.C. §1257(2). The "no preaching" directive -- whether considered alone or in conjunction with the "guidelines" -- was clearly treated as a rule with continuing legal effect and carrying the force and sanction of law. Thus, it falls squarely within the precedents cited on page 3 of the Jurisdictional Statement and page 8 of the Motion to Dismiss.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Jurisdictional Statement, there is no valid factual or legal basis for appellee's Motion to Dismiss. Therefore, the Motion should be denied and this matter should be set down for plenary consideration on the merits.

Respectfully submitted,

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